United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1830

United States Court of Appeals
FOR THE SECOND CIRCUIT

AMSTAR CORPORATION
CALIFORNIA AND HAWAIIAN SUGAR
COMPANY and SuCREST CORPORATION,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

B
P/S

On Petition for Review of the Action of the
Administrator of the Environmental Protection Agency

**REPLY BRIEF FOR PETITIONER
AMSTAR CORPORATION**

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AMSTAR CORPORATION, et al.,	:	
Petitioners,	:	Docket Nos. 74-1830
-against-	:	74-2246
	:	74-1841
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	:	
Respondent.	:	

REPLY BRIEF FOR PETITIONER AMSTAR CORPORATION

In this petition for review of the action of the Administrator of the United States Environmental Protection Agency ("EPA") in promulgating effluent limitations guidelines for the crystalline cane sugar refining industry, petitioner Amstar Corporation ("Amstar") seeks an order remanding the regulations to EPA and requiring EPA (i) to receive additional evidence bearing on two issues and (ii) to consider revising the 1983 BOD5 effluent limitations in accordance with the evidence received.

Amstar contends (i) that such an order is required because EPA failed initially to consider certain data available to it and (ii) that such an order will not work a substantial hardship on EPA because it is currently reviewing

these regulations anyway and already has some data before it bearing on the two issues.

In its answering brief, EPA

(i) concedes that it is currently reviewing these regulations and that it does have data from Amstar bearing on the issues raised by Amstar;

(ii) does not suggest that considering the two issues will work a substantial hardship on it;

(iii) virtually ignores Amstar's demonstration that EPA totally failed to take into account the high costs of constructing cooling towers at urban refineries;

(iv) asserts that it is not required by the Water Act to take into account the huge costs (on the order of $10 million construction cost and $2 million annual operating cost) which will be required to effect a further one percent reduction in Amstar's BOD5* discharges and incorrectly asserts that this Court in Hooker Chemicals** sustains its

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* "BOD5" is defined at page 10 of Amstar's principal brief.

** Hooker Chemicals and Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976).

position;

(v) asserts that Amstar is improperly before this Court because it cites information which became available after promulgation, when in fact both of Amstar's issues find support in the record;

(vi) totally ignores Amstar's demonstration that EPA did not even attempt to ascertain with any specificity the adverse environmental effects of discharging BOD5 (a pollutant which, in this industry, is essentially ordinary, non-toxic sugar) as required by the Water Act; and

(vii) totally ignores Amstar's demonstration that EPA itself employs the logarithmic average method when it is statistically appropriate, which is all that Amstar requests.

ARGUMENT

EPA SHOULD BE ORDERED TO REVIEW, DURING ITS CURRENT RECONSIDERATION OF THE CANE SUGAR LIMITATIONS, THE COST-BENEFIT AND LOGARITHMIC AVERAGE ISSUES

Amstar's request in this petition is that EPA be required to consider two specific issues during its currently proceeding reconsideration of these regulations. Although EPA admits that such a reconsideration is underway and while it does not suggest that complying with Amstar's request will impede the performance of its duties under the Water Act, EPA nevertheless opposes Amstar's request.

Only a few points raised by EPA in its answering brief require response or clarification.

A. This Court's Decision In Hooker Supports Amstar's Position That the Costs of Implementing 1983 Technology at Urban Locations Must Be Thoroughly Considered

EPA virtually ignored Amstar's showing that EPA failed to consider adequately the costs of installing cooling towers at urban refineries where land costs are

high.* Instead, EPA responds that since Amstar is already almost in compliance for 1983,

> "It would not seem unreasonable to conclude that within the next six years, Amstar can improve its in-plant controls to make the slight additional reductions in BOD5 necessary to meet BAT." (EPA Brief, p. 17).

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* EPA states that "We have responded to this [urban cooling tower] issue in Section V(B) of this brief." (EPA Brief, p. 12n. 7) In reality, however, EPA's "response" there is merely a conclusory, unsubstantiated statement:

> "Furthermore, it should be noted that EPA took into account the potential increased costs of installing a cooling tower and its auxiliary equipment in urban locations. This was accomplished by adjusting the $400,000 estimate for cooling towers to $709,000 for urban refineries (see R 2570)." (EPA Brief, p. 65).

It is impossible to determine from an inspection of Record page 2570 (A-93) whether any such adjustment was made. Moreover, this statement is squarely contradicted by the statement in EPA's Development Document, quoted in Amstar's first brief (pp. 16-17):

> "Land costs vary widely. The figures used herein are considered to be representative of non-urban areas where the use of land would be expected. In urban areas land is often not available; when it is used, the cost can be expected to be substantially higher than reported in this document." (DD 109, R 3222, A-366) (emphasis added).

EPA did not respond to Amstar's quotation of this extremely crucial statement.

It is precisely because Amstar is uncertain whether it can effect the "slight additional reductions" in BOD5 discharge that Amstar brings on this petition for review. Amstar's BOD5 discharge performance has been fairly consistent over the past two years and there is nothing to indicate that any further reduction, even over six years, is possible. Amstar therefore seeks a slight easing of the 1983 BOD5 limitation.

Turning to EPA's discussion of the merits, EPA invokes a partial quotation of this Court's opinion in Hooker Chemicals to support its position that "the Courts have allowed EPA considerable latitude with respect to BAT costs" (EPA Brief, p. 63), when in fact, the very next sentence of the opinion supports Amstar's position that EPA's total failure to consider the costs of constructing cooling towers at urban locations warrants a remand of the 1983 BOD5 regulations. The first two sentences of the following excerpt from Hooker were quoted by EPA; the paragraph following those sentences puts the truncated excerpt in context:

> "It would be unfair to expect the EPA to pinpoint exactly all conceivable cost ramifications of the 1983 limitations. To precisely identify the costs many years into the future is an almost impossible task.
>
> "But the absence of any practical consideration of costs is unjustifiable, and where the record leaves those who are subject to the 1983 limitations without any suggestions or specifications as to how they may attempt to

> comply, the 1983 limitations must be vacated. FMC Corporation, Inc. v. Train, ___ F.2d ___, [slip op. at 14-16] (4th Cir. [March 10,] 1976). The implementation of plans to control 1983 effluent discharged must be begun now. A record which fails to disclose a reasonable basis for belief that a new technology will be available and economically achievable is deficient. de Nemours II, supra, at 30(c)." (537 F.2d at 635) (emphasis added).

In Hooker Chemicals, this Court determined that EPA failed to consider the costs of certain cold weather technology adjustments and held that, since at least one of the affected dischargers was located in a cold climate area, "a failure adequately to consider cold weather costs was unreasonable" and remanded the regulations for consideration of such costs. 537 F.2d at 634.

After Hooker Chemicals, EPA's admitted failure to consider the costs of acquiring land in urban locations, or the alternative costs of constructing a cooling tower "on the roof, in the basement [or] above a parking lot" (DD 143, R 3256, A-400), clearly render these regulations inadequate. This Court, as it did in Hooker, should remand the regulations for consideration of this issue.*

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* Also relevant to the cost issue is the statutory requirement that EPA, in determining the 1983 limitations, must consider "the cost of achieving such effluent reduction." Water Act § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B). Amstar contends that this language requires a cost-benefit analysis of some kind to determine whether the costs of achieving a particular reduction in pollution (in Amstar's

(Footnote continued on next page)

B. EPA Rejects Amstar's Logarithmic Average Suggestion Even Before Hearing the Presentation Which It Argues Amstar Must Make Before Seeking Review Here

Amstar contends that dischargers should be allowed to use the logarithmic average method to compute the monthly average of daily discharge levels, not all the time, but only when it is statistically appropriate. Amstar showed that EPA itself uses exactly that method when it is statistically appropriate. (Amstar Brief, pp. 26-29).

EPA's response to this argument is a study in blurred images and contradictions.

EPA's first response is to state that Amstar, in order to obtain judicial review of the issue, must first

(Footnote cont'd.)

case, on the order of $10 million and $2 million annually) is justified by the resulting benefits (avoiding the discharge of a few hundred pounds of sugar per day into the industrial rivers of the Northeast). (See Amstar Brief, pp. 15-23)

EPA ignores Amstar's numerous citations to Appalachian Power Co. v. Train, Nos. 74-2096 et al. (4th Cir. July 16, 1976), in which the Fourth Circuit, despite seemingly contrary legislative history, agrees with Amstar's position. (The legislative history of the Water Act is of little practical benefit because, in that legislative history,

"Support can be had for diametrically opposed conclusions. . . . [and] statements can be found to uphold almost any position which one cares to take." E.I. DuPont de Nemours & Co. v. Train, 8 E.R.C. 1718, 1721 (4th Cir. 1976).)

"present the information to EPA for the Agency to determine initially whether a revision is warranted." (EPA Brief at 13) However, EPA states two pages later that "EPA is now reviewing the cane sugar refining regulations and has been supplied information on the two issues raised herein (see Amstar at 29)." (EPA Brief at 15) (emphasis added).*

Next, while asserting that Amstar has improperly failed to seek EPA's formal decision on the issue before coming to Court, EPA simultaneously makes any such effort academic by rejecting, in its brief, Amstar's suggestion (EPA Brief, pp. 17-18).

Furthermore, EPA attempts to justify its rejection of the logarithmic average by stating:

> "EPA based the BAT limitations not only on in-plant controls, but also on the use of cooling towers and other applicable technologies. The arithmetic mean accurately describes the effluent discharged following treatment by these technologies." (EPA Brief, p. 18).

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* In fact, an expert's statistical study which is part of the Record and which is one of the references cited in the Development Document, demonstrated lognormal distribution for BOD5 discharges at Amstar's Philadelphia refinery, and thus EPA had data before it indicating that the logarithmic average was statistically more appropriate in certain circumstances. W. Dennis, A Statistical Analysis of the BOD5 and FSOD Content of Intake and Discharge Water at Amstar Philadelphia Refinery, Warf Institute, Madison, Wisconsin (R 613-71, cited in Development Document, Reference No. 17 (DD 162, R 3271, A-415)). EPA's contractor received this study in May 1973, almost a year before the Development Document was issued in final form.

EPA thus states that the logarithmic average method is unnecessary if dischargers erect cooling towers, but this statement squarely contradicts EPA's published -- and oft-repeated -- statement that dischargers are not required to use any particular treatment technology to meet the limitations.* Furthermore, implicit in this statement is EPA's acknowledgment that the arithmetic mean is appropriate only when it "accurately describes the effluent discharged," which is exactly Amstar's contention.

Finally, EPA simply ignores Amstar's showing that EPA itself uses the logarithmic average when it is statistically appropriate (see Amstar's main brief, pp. 26-29).

In short, EPA's steadfast opposition to use of the logarithmic average by dischargers, when statistically appropriate, has not abated, despite EPA's own use of the average in statistically comparable circumstances. In these circumstances, EPA should be ordered by this Court

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* At the time these regulations were promulgated, EPA, answering the State of Hawaii's criticism of cooling towers, stated:

"The EPA's guidelines limit only the quantity and quality of the pollutants which may be discharged. Dischargers may employ any technology, including land disposal or other alternatives, which will result in compliance with such limitations." 39 Fed. Reg. 10523 (March 20, 1974) (Comment 19) (A-246).

to consider formally the logarithmic average during its current review of these regulations.

C. Judicial Review of Amstar's Contentions Is Appropriate Now

EPA attempts to characterize Amstar's petition as a request for "a revision of the limitations based on information that became available subsequent to the original promulgation." (EPA Brief, p. 13). While it is true that some information presented in Amstar's principal brief (e.g., (i) the data regarding Amstar's recent discharge performance and (ii) the fact of EPA's own use of the logarithmic average) only became available after promulgation, Amstar does not base its request solely on that new information. Rather, it is interwoven in issues properly before this Court.

First, regarding the issue of 1983 costs, Amstar, quoting from EPA's own documents, clearly established that EPA did not consider the costs of constructing cooling towers in urban locations. (Amstar Brief, pp. 15-18) A remand is required because of that failure alone. In the alternative, Amstar requested that EPA be ordered to receive additional evidence regarding Amstar's current, improved BOD5 discharge performance and to consider revising the regulations accordingly. (Amstar Brief, pp. 14, 23).

Second, regarding the logarithmic average issue, Amstar has demonstrated that EPA, at the time of promulgation, had before it data, including an expert's conclusions, demonstrating that the logarithmic average should be allowed in certain cases. (Amstar Brief, p. 28) Since promulgation, EPA itself has used the logarithmic average in statistically comparable circumstances. Nevertheless, EPA rejects Amstar's suggeston in its brief, thus rendering academic the very application which it argues Amstar must make before raising the issue here.

Under these circumstances, easily distinguishable from those in Oljato Chapter v. Train, 515 F.2d 654 (D.C. Cir. 1975), cited by EPA, it is an elevation of procedure over substance to suggest that Amstar should first present certain relevant data to EPA before seeking judicial review. The mere fact that data relevant to two issues has become available since promulgation should not prevent their review now, when there exist independent grounds in the record to sustain review now. Just as EPA itself employs after-acquired data to bolster its brief (pp. 34-37,

60), Amstar's arguments find support in recent events and are thereby strengthened, not weakened.

November 8, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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AMSTAR CORPORATION, :

Petitioner, :

-against- : No. 74-1830

ENVIRONMENTAL PROTECTION AGENCY, :

Respondent. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is over the age of twenty-one years; that he is employed by the firm of Sullivan & Cromwell, attorneys for Petitioner; that on the 8th day of November, 1976 he served the within brief upon the following attorneys at the following addresses by depositing two true copies of the same to each of the following attorneys, securely enclosed in a postpaid wrapper in the Post Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said attorneys at said addresses as follows:

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George A. Schatze

Sworn to before me this
8th day of November, 1976.

Eileen L. Franklyn
Notary Public

EILEEN L. FRANKLYN
NOTARY P... York
Qualified in ...
Commission Expires March 30, 1977